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IN THE

Supreme Court of the United States

October Term, 1957
No. 33

MICHAEL WILSON, *et al.*,

Petitioners,

vs.

LOEW'S INCORPORATED, a corporation, *et al.*,

Respondents.

On Writ of Certiorari to the District Court of Appeal, Second Appellate District, State of California, Division Three.

BRIEF OF RESPONDENTS DOYLE, JACKSON AND WHEELER.

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BRIEF OF RESPONDENTS DOYLE, JACKSON AND WHEELER.

Preliminary Statement Regarding Parties Respondent.

On the face of, and again on page one, of their Petition for Certiorari, petitioners have named the following eleven persons, *inter alia*, as respondents in this cause: John S. Wood, Francis E. Walter, Morgan M. Moulder, Clyde Doyle, James B. Frazier, Harold E. Velde, Barnard W. Kearney, Donald L. Jackson, Charles E. Potter, Louis J. Russell, and William Wheeler.

In the amended complaint filed in the trial court the first nine of said persons are identified as members of the United States House of Representatives Committee on Un-American Activities (referred to hereinafter as "Committee") and the latter two as Senior Investigator and an investigator, respectively, of the Committee [R. 34].

We respectfully call the Court's attention to the fact that only three of said eleven persons were parties to the judgment below, and hence respondents in this Court [R. 61, 77].

Two of said three persons, Clyde Doyle and Donald L. Jackson, are members of said Committee; the third, William Wheeler, is an investigator for the Committee.

This is the brief of those three respondents.

Through inadvertence, the Brief in Opposition to Petition for Certiorari and in Reply to Brief of *Amicus Curiae,* referred to counsel for these three respondents as counsel also for Messrs. Wood, Walter, Moulder, Frazier, Velde, Kearney, Potter and Russell as respondents, although they were not before the Court and not parties to the judgment in the state court.

Summary of Argument.

As these respondents adopt the argument in the brief of industry respondents insofar as applicable, they also adopt the summary of argument in said brief relevant thereto, and herein summarize only the separate arguments made in this brief.

The allegation in the amended complaint in the trial court that these respondents acted "both in their official capacity with reference to said . . . Committee . . . and individually in non-official capacities" does not state a cause of action against them in their official capacity and is not admitted by their demurrer in the trial court, where the acts which they are alleged to have committed appear on the face of the amended complaint and are of a character which a court will take judicial notice are not within the scope of their official duties.

Indeed, if a cause of action, valid in other respects, had been asserted against them in their official capacity it would be barred by the constitutional immunity conferred upon members of Congress.

This Court should not take judicial notice of reports of the Committee which relate to matters occurring before respondents became affiliated in any way with the Committee, to matters whose asserted probative value depends not merely upon what was said but upon the truth and correctness of the statements made, or to matters which are irrelevant to any issues before this Court.

The taking of judicial notice by the District Court of Appeal of Committee reports with reference to matters which played no part in the grounds of its decision presents no justiciable issue in this Court.

ARGUMENT.

I.

Adoption of Brief of Industry Respondents.

To avoid duplication these respondents adopt the brief of industry respondents insofar as applicable.

II.

Petitioners' Criticisms of the Committee Are Irrelevant.

After almost totally ignoring the Committee, including these three respondents, in the court below,[1] in this Court "Petitioners' most vigorous and vehement argument is reserved for their attack on the motives of the . . . Committee . . ." (Br. of Industry Resp., p. 51).

Much of pages 51-80 of "Brief of Petitioners" is devoted to a violent denunciation of the Committee, citing in support of this thesis various dissenting opinions in judicial decisions, articles in periodicals, statements of Congressmen, and other sources.

In so doing petitioners commit some of the very excesses with which they charge the Committee.

Petitioners charge that the Committee, in the course of its hearings, has investigated matters which exceed what petitioners allege to be the proper bounds of investigation (Br. of Pet. p. 54).

Yet in the course of their frenetic attack, petitioners cite miscellaneous sources from 1956 all the way back

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[1]In their Opening Brief in the District Court of Appeal petitioners devoted 36 pages of argument to the judgment based on the demurrer of industry respondents, and 2 pages, at the very end of their brief, to the judgment based on the demurrer of these three respondents (Supp. R, Op. Br. for Pl.-App. pp 7-42, 42-44].

to 1938, without making any distinction whatever between actions and statements attributed to the Committee years before any of the parties to the present controversy became members thereof, and actions and statements after that time.

Respondents Doyle and Jackson became members of the Committee in 1949. Of the seven other Committee members named as defendants in the amended complaint who are not respondents in this Court, John S. Wood became a member of the Committee in 1947, and the others in 1949 or 1951.

Yet petitioners recklessly cite statements of former Congressmen Dies (made in 1938), Rankin (made in 1945), Mundt (made in 1946), a law review article published in April, 1947, dissenting opinions in cases decided in 1947 and 1948, and Committee Reports made in 1948 —all on the theory that the statements about the Committee contained therein can somehow be held to bind the parties in this case.

In so doing, petitioners do not invoke the principle of guilt by association—on the contrary, they infer that there may be guilt without the necessity of any association, merely by virtue of the fact that respondents later became members and employees of a Committee whose former members petitioners charge with improprieties.

Petitioners cite *Watkins v. United States* (1957), 354 U. S. 178, no less than eleven times—more than any other authority (Br. of Pet. pp. 33, 44, 69, 71, 73, 76, 78, 82, 83, 85, 91). The essential holding in *Watkins* was that a witness could not be convicted of contempt for refusal to answer a question before the Committee where

the *pertinency* of the question to a proper subject of investigation was not made clear to him, at the time.

But petitioners' entire tirade is totally devoid of pertinency to this cause. In the *Watkins* case, decided last June, this Court made several criticisms of the Committee's activities, and we can only assume that petitioners' irrelevant charges constitute an attempt to identify this case in the mind of the Court with the criticisms expressed in the *Watkins* case.

The Committee is not on trial in this case and the amended complaint does not allege any wrongdoing by it.

It is there alleged that these respondents (together with the 17 other respondents, and the 30 other named defendants who are not respondents) agreed to refuse employment to and exclude from employment in the motion picture industry, (a) all employees and persons seeking employment who, in reliance on the Constitution of the United States including the Fifth Amendment thereto, refused to answer questions concerning their political affiliations, associations and beliefs; and (b) all employees and persons seeking employment who were named before the Committee as Communists and who refused or failed to appear and surrender their constitutional rights and privileges and testify fully disclosing their own political affiliations, associations and beliefs and those of their family, friends, associates and acquaintances [R. 35].

It is also alleged that said respondents and defendants agreed that such employees and other persons would not be employed in the motion picture industry [R. 35].

Two overt acts are charged, one general, the other specific, *i.e.* (1) inducing and persuading each other and other employers in the motion picture industry to desist

and refrain from employing, and to refuse employment to, all such employees and persons; (2) publishing and circulating a blacklist [R. 36].

The purposes of the agreement are alleged to be threefold:

(1) To limit control and direct the political activities of the employees of said respondents and defendants and to coerce and influence them by threats of discharge and loss of employment to refrain from adopting or following any course or line of political action and activity not acceptable to the Committee; (2) to limit employment in the motion picture industry to those persons whose political beliefs are acceptable to the Committee; (3) to limit the production of motion pictures by said industry to those the content of which is acceptable to the Committee [R. 37].

Only the first two of these purposes have to do with the petitioners. The industry might object to the third, or perhaps the public, but not petitioners.

It is clear that no actionable conduct or activities of the Committee are charged in these allegations. True, it is alleged that the respondents adopted and implemented standards set by the Committee—although it is not alleged what these standards are—but that does not constitute a charge of an actionable wrong on the part of the Committee. The respondents might have adopted as a basis for their action membership or nonmembership in the Screen Actors Guild, conformity or nonconformity with standards set by the NAACP, or a pro-segregation group, or the Knights of Columbus or a Masonic body, but surely there would be no liability on the part of any of those groups because their respec-

tive standards of membership or non-membership in their respective organizations was adopted by a group such as the respondents in this case as a basis of action. And, of course, the Committee, being a governmental agency, is not subject to a civil suit in the absence of a statute permitting it.

It follows that the attempt to put the Committee itself on trial has no justification in law; and the arguments in the Brief of Petitioners and excerpts from the record of the proceedings of the Committee and its reports have no place here.

III.

No Cause of Action Is Asserted Against Respondents in Their Official Capacity.

Petitioners inferentially justify their attacks on the Committee on the ground that it is alleged in the amended complaint that these three respondents "acted both in their official capacity with relation to said House Committee on Un-American Activities and individually in unofficial capacities" [R. 8].

Petitioners state that respondents' demurrer admitted the allegation that the acts were performed in their official capacities (Br. of Pet. p. 116).

This is not so.

The courts have held that allegations in a pleading as to the legal capacity in which a defendant performed acts will be disregarded where either the pleading shows on its face that the acts were performed in a different capacity, or where the court may take judicial notice of that circumstance.

Thus in *Cochran v. Couzens* (D. C. Cir., 1930), 42 F. 2d 783, *cert. den.* 282 U. S. 874, an action for slander was brought against a Senator in a speech given by him in the Senate alleged to have been made "unofficially and not in the discharge of his official duties as a Senator of the United States."

In affirming the action of the trial court, sustaining the motion to dismiss, the appellate court said:

> "The averment that these words were spoken 'unofficially and not in the discharge of his official duties as a Senator' is a mere conclusion and entirely qualified by the averment that they were uttered in the course of a speech." (p. 784).

In *Cooper v. O'Connor* (D. C. Cir., 1938), 99 F. 2d 135, *cert. den.* 305 U. S. 643, the appellees were sued in their individual capacity; the declaration did not even reveal that they were officers of the United States.

On demurrer, the trial court took judicial notice both of the offices which they held and that the acts in question were within the scope of their official duties, and sustained the demurrer. The appellate court affirmed.

To the same effect is *Laughlin v. Rosenman* (D. C. Cir., 1947), 163 F. 2d 838, holding, in affirming the dismissal of the complaint, that where the facts alleged showed that the acts in question were done in the parties' official capacity "the application of the rule of immunity cannot be avoided by the allegation that the defendants are sued in their personal capacities." (p. 843.)

The law of California is in accord.

In *Griffin v. County of Colusa* (1941), 44 Cal. App. 2d 915, in affirming a judgment entered after the sustaining of a demurrer to the complaint, it was said:

> "Plaintiff relying upon the rule that all facts well pleaded are admitted as true upon demurrer, contends the allegation in the amended complaint 'that at all the times herein mentioned the County of Colusa . . . maintained . . . and conducted in a proprietary capacity, a county hospital, known as the Colusa Memorial Hospital', must be accepted as true.
>
> "This general rule of pleading, however, does not admit a conclusion of law, . . . or allegations contrary to facts of which a court may take judicial knowledge." (p. 918.)

The court then noted the allegations of the complaint concerning the persons to and circumstances under which hospitalization would be furnished, and concluded that the hospital in question was being conducted by the county in a governmental capacity and not in a proprietary capacity.

In *Walker v. City and County of San Francisco* (1950), 97 Cal. App. 2d 901, a suit against a municipality for the death of a fireman struck by a streetcar, the court, in affirming a judgment of dismissal entered after the sustaining of a demurrer to the complaint, said that an allegation that the municipality operated the fire department and streetcar line in the capacities of two separate entities would be disregarded as a mere conclusion where the court, by the exercise of judicial notice, knew that the allegation was untrue.[2]

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[2]Plaintiffs therefore were not entitled to bring a judicial action, their proper remedy being an administrative proceeding under the workmen's compensation laws.

See, also:

Chavez v. Times-Mirror Co. (1921), 185 Cal. 20, 23;

Mullan v. State (1896), 114 Cal. 578, 581-2;

Livermore v. Beal (1937), 18 Cal. App. 2d 535, 539-540 and cases cited;

Arnold v. Universal Oil Land Co. (1941), 45 Cal. App. 2d 522, 529.

In the present case, the acts with which respondents are charged are the entering into an agreement with persons and corporations in the motion picture industry to refuse employment to and exclude from employment in said industry certain persons; inducing employers in that industry not to employ certain persons; and publishing and circulating a blacklist in said industry to effectuate said objectives.

This Court may take judicial notice that such acts are no part of the official duties of Congressmen and employees of Congressional committees.

Petitioners really concede the point when they say:

> "The facts set forth in the complaint showed conduct far removed from official duty. It is certainly not within the scope of the jurisdiction of members of a legislative committee, or employees of such a committee, to conspire with private persons to deprive citizens of their right to work and to further the conspiracy by circulating blacklists and otherwise coercing employers in the industry." (Br. for Pet. p. 117.)

Indeed even in the District Court of Appeal, petitioners stated:

> "At this stage of the proceedings, their conduct was wholly outside the area of official conduct and

no issue of official immunity can arise at this point, nor has there been any such plea interposed. Certainly the suit herein seeks no relief because of any legislative action taken by respondents or because of any lawful conduct within the area of legislative inquiries" [Supp. R., Op. Br. of Pltf.-App. p. 44].

It necessarily follows that no cause of action is asserted against respondents in their official capacity.

IV.

No Cause of Action Could Be Asserted Against Respondents in Their Official Capacity.

The Constitution of the United States provides, with reference to members of Congress, that "for any speech or debate in either House, they shall not be questioned in any other place." (Art. I, Sec. 6).

This provision restates a principle of early English law, based on the public interest in having legislators free from all legal liability for their official actions (see *Tenney v. Brandhove* (1951), 341 U. S. 367, 372-376).

In *Kilbourn v. Thompson* (1881), 103 U. S. 168 this Court held that members of a House of Representatives Committee who instigated and voted for a resolution illegally adjudging plaintiff in contempt of the House, pursuant to which he was arrested, had no civil liability therefor.

The principle was also recognized in *Tenney v. Brandhove* (1951), 341 U. S. 367, construing a federal statute imposing civil liability upon any one who deprived another of Constitutional rights under color of state law, as impliedly exempting state legislators acting "in a field where legislators traditionally have power to act."

It has been recognized that the immunity extends to activities of members of Congressional committees. The *Tenney* case held that interrogation of a witness by a committee of the legislature was part of the "field where legislators traditionally have power to act." (See, in accord, *Yankwich: The Immunity of Congressional Speech —Its Origin, Meanings and Scope* (1951), 99 U. of Pa. L. Rev. 960 at 967.)

The immunity has been held to extend not only to liability in damages, but to injunctive relief as well.

Thus in *Nelson v. United States* (D. C. Cir., 1953), 208 F. 2d 505, *cert. den.*, 346 U. S. 827, it was said that "a court can no more enjoin a congressional committee from making an unconstitutional search than it can enjoin Congress from passing an unconstitutional bill." (p. 513).

As was said in *Barsky v United States* (D. C. Cir., 1947), 167 F. 2d 241, *cert. den.* 334 U. S. 843:

> "The remedy for unseemly conduct, if any, by Committees of Congress is in Congress, or in the people; it is political and not judicial." (p. 250).

The *Barsky* decision also referred to

> "the established rule of absolute immunity of governmental officials, Congressional and administrative from liability for damage done by their acts as such even though knowingly false or wrong" (p. 250).

None of the cases cited by petitioners at page 117 of their Brief are in any way inconsistent with the foregoing.

Three of the cases (*Ex parte Virginia* (1880), 100 U. S. 339; *Lewis v. Brautigam* (5 Cir., 1955), 227 F. 2d 124; and *Picking v. Penn. R.R. Co.* (3 Cir., 1945), 151 F. 2d 240) involved the liability of *state officers* un-

der *federal statutes* passed by Congress under authority of the Fourteenth Amendment.

The fourth case, *United States v. Bramblett* (1955), 348 U. S. 503, involved the criminal liability of a Congressman who falsely represented to the Disbursing Office of the House of Representatives that a certain woman was entitled to compensation as his employee. Obviously this act was remote from his official duties.

V.

This Court Should Not Take Judicial Notice of the Portions of the Committee's Reports and Proceedings Invoked by Petitioners.

On page 7 and following of their brief, petitioners impliedly ask this Court to take judicial notice of various portions of the proceedings of the Committee set forth in Appendix "B" of their brief.

It is respectfully submitted that none of the material therein contained is a proper subject of judicial notice in this cause.

About one-half of the quoted excerpts occurred in 1947 when none of these respondents were members or employees of the Committee. Indeed, of the nine Committee members and two Committee employees named as defendants in the trial court, only one, namely John S. Wood, was a member of or attached to the Committee at that time. The House of Representatives (unlike the Senate) is not a continuing body, but organizes as a new and separate body each biennium.

The gravamen of petitioners' amended complaint is an alleged agreement between all of the named defendants, made "on and prior to March, 1951," and continuously thereafter [R. 35]. Although the Complaint

does not specifically allege how long "prior to" March, 1951, said agreement was made, it does allege that "at all times herein mentioned" defendants Wood, Walter, Moulder, Doyle, Frazier, Velde, Kearney, Jackson and Potter were members of the Committee [R. 34]. Since Messrs. Doyle, Frazier, Kearney, Jackson and Potter did not become members of the Committee until January, 1951, the agreement in question was not, and could not have been, entered into before that date.

All of the Committee proceedings at which petitioners invoked the Fifth Amendment or were named as Communists appear to have occurred in 1951 and later years. (Supp. R. Resp. Br., Appx. A; Br. for Pet., Appx. B, pp. 59-60).

Petitioners allege that the relevancy of the 1947 hearings is that they manifest a "potential" conspiracy, which culminated in the agreement alleged in the amended complaint. (Br. for Pet. 7-8). This is tantamount to saying that the proceedings are referred to as tending to prove the truth of the allegation in the amended complaint that an agreement was formed. But since the formation of the agreement is not in issue in this proceeding, evidence in support of the allegation is irrelevant.

As to much of the proceedings referred to, both in 1947 and later, even the inferred probative value of the various statements depends upon the truth and accuracy of the statements, *i.e.*, statements regarding the purposes and objectives of the Committee and regarding the employment records of petitioners. But nothing in the statements themselves indicates whether or not they are true or false, correct or incorrect.

VI.

No Justiciable Question Is Presented by the Judicial Notice Taken of Proceedings Before the Committee by the District Court of Appeal.

Industry respondents, in their brief in the District Court of Appeal, requested that court to supplement petitioners' amended complaint by taking judicial notice of the Committee's official report of its proceedings at which certain appellants appeared (Supp. R, Resp. Br. p. 48).

In making this request, those respondents were careful to note that "Of course, notice is not taken for the purpose of establishing the truth of any of the matters testified to before the Committee" and to add that the purpose of taking notice was that the court might be aware "of the questions actually asked and the answers given by appellants" (Supp. R, Resp. Br. p. 48). In an appendix to said brief, respondents set forth the testimony of a number of appellants, given before said Committee, taken from the official report of proceedings before said committee (Supp. R, Resp. Br., Appx. A). The District Court of Appeal took judicial notice of said testimony [R. 67].

Without solicitation by any party, that court apparently also took judicial notice of other sources, including reports of said Committee, which it concluded demonstrated that the Communist party constituted a "conspiratorial and revolutionary junta"[3] and not a political affilia-

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[3]This language was quoted from the separate opinion of Mr. Justice Jackson in *American Communications Association v. Douds* (1950), 339 U. S. 382, 424.

tion, contrary to the allegations in the amended complaint [R. 68].

Petitioners correctly state that the court's remarks in this regard were "by way of dicta," and that "This construction of the complaint, however, was not any part of the court's basis for its affirmance of the judgments of dismissal" (Pet. for Cert. p. 10, fn. 1a).

Yet, later in the same document, petitioners allege that "this peripheral ruling raises substantial federal questions which this court should adjudicate" and urge that the use made of judicial notice was a denial of due process under the Fourteenth Amendment (Pet. for Cert. pp. 28-29).

In the Brief for Petitioners it is once more admitted that "This construction of the complaint, however, was not any part of the court's stated basis for its affirmance of the judgment of dismissal" (p. 14).

But later in the same Brief, petitioners, although again conceding that "It is also clear that the aforesaid holdings were not the grounds of the ruling of the court below" (p. 89), devote five pages to argument of the matter (pp. 87-92), stating as their reasons for so doing that "the opinion in these respects is . . . *erroneous* . . . and appears to have *motivated* to some degree the final decision" (p. 89; emphasis ours).

Since this Court does not sit to review either the correctness of dicta or the motives of judges the impropriety of petitioners' argument is apparent.

Conclusion.

The writ of certiorari should be dismissed for want of jurisdiction. If, however, it is determined that jurisdiction of the merits exists, the judgment of the District Court of Appeal should be affirmed.

Respectfully submitted,

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